APPENDIX A: MEMORANDUM OPINION OF THE FIRST JUDICIAL CIRCUIT COURT (YANKTON, SOUTH DAKOTA), THE HONORABLE ARTHUR L. RUSCH, AUGUST 10, 2002, FILED AUGUST 12, 2002

Thomas J. Yarcheski,
Plaintiff

v.

Kevin Reiner, Celia Miner, and Johnson, Heidepreim, Miner, Marlow & Janklow, LLP,
Defendants

(CV-00-44, Yankton County)

This matter is before the Court pursuant to the defendants' motion for summary judgment. Defendants filed a brief in support of their motion on December 21, 2001. Plaintiff (who is acting *pro se* in this matter) filed a 45-page objection to the defendants' motion for summary judgment and response to their supporting brief on March 5, 2002. Defendants filed a reply brief on April 1, 2002 and plaintiff then filed a "Final Response to the Defendant's Motion for Summary Judgment and Addition to the Plaintiff's Counter-Motion for Summary Judgment" dated April 8, 2002. Oral argument was had on the motion on May 7, 2002.

FACTS

Plaintiff was employed by the University of South Dakota as an Associate Professor in the School of Business

for the 1991-1992 school year.[1] During his first year of employment the University determined not to renew his contract.

Plaintiff then employed attorney Celia Miner to assist him in taking appropriate appeals. Miner directed Kevin Reiner, an associate in the Johnson, Heidepreim, Miner, Marlow & Janklow law firm, to assist her. Miner and Reiner pursued an appeal to the South Dakota Board of Regents and South Dakota Department of Labor. Plaintiff lost at both stages.

Plaintiff then directed Miner and Reiner to file an appeal of the Department of Labor decision to the Circuit Court. The Notice of Appeal was filed on March 10, 1994 (Hughes County CIV 94-105). Although Reiner left the law firm in 1994, he prepared an opening brief to the Circuit Court which was served on April 13, 1995.

The South Dakota Board of Regents moved to dismiss the appeal because the brief had not been within one year. On July 10, 1995, the Circuit Court in Hughes County dismissed the appeal. Plaintiff appealed that dismissal to the South Dakota Supreme Court (Appeal #19329). On December 9, 1996, the South Dakota Supreme Court summarily affirmed the decision of the Circuit Court dismissing plaintiff's appeal.

PROCEDURAL HISTORY

On January 28, 2000, plaintiff commenced this action alleging legal malpractice by Reiner, Miner and their law firm. Initially plaintiff was represented by attorney Bruce Anderson of Wagner and defendants were represented by attorney William Fuller of Sioux Falls.

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[1] His employment contract incorporated the COHE (Council of Higher Education) contract by reference.

In February of 2000, Fuller removed this action to the United States District Court. However, on its own motion, the District Court held that removal was improper and remanded the case back to the First Circuit Court.

Thereafter present counsel began representing defendants. Beginning in September of 200, they made extensive efforts to depose the plaintiff. On January 19, 2001 plaintiff's attorney moved this Court to determine where plaintiff's deposition should be taken. On January 24, 2001 this Court heard that motion, construing it as a motion for a protective order authorized under SDCL § 15-6-26(c. The Court denied plaintiff's request to order that his deposition be taken in Maine and set the deposition for January 31, 2001.

Thereafter, attorney Bruce Anderson moved to withdraw but, at plaintiff's request, filed a petition for an intermediate appeal of this decision. Plaintiff objected to his attorney's withdrawal. On March 13, 2001, this Court allowed Bruce Anderson to withdraw from the case effective after the taking of the deposition on May 2nd. Later that order was modified to be effective immediately.[2] In the fourteen months that have elapsed since that time plaintiff has been unable to find any other attorneys willing to represent him.

On February 14, 2001, defendants moved the Court for an order compelling plaintiff to appear for his deposition. On March 2, 2001, this Court entered an order compelling plaintiff to appear to have his deposition taken on May 2,

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[2] The Court allowed attorney Anderson to withdraw from the case because of plaintiff's abusive and threatening conduct towards him. Despite the fact that plaintiff was objecting to Anderson's withdrawal, he was sending communications to him threatening him with complaints to the bar ethics committee, claiming that he was "professionally impaired" and stating "Please seek clinical treatment." The Court concluded that these statements by plaintiff demonstrated such a breakdown of the attorney/client relationship that no reasonable attorney could continue to represent him under those circumstances.

2001. On March 9, 2001, the Supreme Court denied the petition for intermediate appeal.

On December 21, 2001, defendants moved for summary judgment based upon two volumes of exhibits as well as separate affidavits of Thomas Welk and Celia Miner. On January 7, 2002, plaintiff moved to stay the motion for summary judgment and for an expedited hearing on his motion to stay. On January 14, 2002 this Court stayed the proceedings to the extent of extending the briefing schedule. On March 5, 2002, plaintiff filed a further motion for a continuance in the summary judgment proceedings. On March 6th this Court denied that motion. On March 5th the plaintiff also filed a "Counter-Motion for Summary Judgment." At the hearing on May 7, 2002 the Court denied plaintiff's motion for summary judgment. Plaintiff then filed a petition for an intermediate appeal of that decision. On June 26, 2002, the Supreme Court denied that petition for an intermediate appeal.

DECISION

I. STANDARD OF REVIEW

Summary judgment is proper only when the moving party shows that such relief is merited as a matter of law because there are no genuine issues of material fact. First Western Bank v. Livestock Yards, 444 NW2d 387 (SD 1989). Caneva v. Miners and Merchants Bank, 335 NW2d 339 (SD 1983). Summary judgment is an extreme remedy, which should only be granted when there are no genuine issues of material fact.[3] It is not a substitute for a trial when

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[3] In Weiss v. Van Norman, 1997 SD 40, 562 NW2d 113 the South Dakota Supreme Court stated: "A disputed fact is not 'material' unless it would affect the outcome of the suit under the governing substantive law in that a 'reasonable jury could return a verdict for the nonmoving party.'" Parsons v. Dacy, 502 NW 2d 108, 110 (SD 1993) (quoting

there are genuine issues. The burden of proof is upon the moving party to show clearly that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law. Klatt v. Continental Ins. Co., 409 NW2d 366 (SD 1987). Summary judgment is only appropriate when the court determines that the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits of the parties, reveal that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. SDCL § 15-6-56(c); Breen v. Dakota Gear & Joint CO., Inc., 433 NW2d 221, 223 (SD 1988). A mere surmise that a party will not prevail at trial is not a sufficient basis to grant summary judgment.

In addressing a motion for summary judgment: (1) the burden of proof is on the moving party; (2) the court views the evidence most favorably to the non-moving party; (3) summary judgment is not a substitute for trial; (4) summary judgment is not appropriately granted just because the court believes the non-moving party will not prevail at trial; and (5) summary judgment is an extreme remedy and should be awarded only on a clear showing of the necessary elements. Wilson v. Great Northern RR. Co., 157 NW2d 19 (SD 1968); Production Credit Ass'n v. Wynne, 474 NW2d 735, 737-38 (SD 1991).

While the moving party has the burden of showing that there are no genuine issues of material fact, the non-moving party cannot merely rest on the pleading, but must present

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Anderson v. Liberty Lobby, Inc., 477 US 242, 248, 106 SCt 2505, 2510, 91 Led2d 202, 212 (1986); see also Celotex Corp. v. Catrett, 477 US 317, 322-23, 106 SCt 2548, 2552, 91 Led2d 265, 273 (1986) (stating that the rule "mandates the entry of summary judgment...against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.").

specific facts by way of "...affidavits or as otherwise provided in § 15-6-56..." setting forth specific facts showing the existence of genuine issues of material fact. Baatz v. Arrow Bar, 452 NW2d 138 (SD 1990). Mere general allegations or denials will not prevent the issuance of summary judgment. Weiszhaar Farms, Inc. v. Livestock State Bank, 467 NW2d 752 (SD 1991); Werner v. Norwest Bank of South Dakota, N.A., 499 NW2d 138 (SD 1993). The party opposing summary judgment must establish the specific facts which show that a genuine and material issue for trial exists. Anderson v. Production Credit Ass'n, 482 NW2d 642, 644 (SD 1992).

II. A "CASE WITHIN A CASE."

This action is one for legal malpractice arising from defendants' failure to timely file a brief in plaintiff's appeal from an adverse decision of the Department of Labor. This resulted in a dismissal of the appeal. The dismissal was upheld by the Supreme Court.

Because of the fact that this is an action for legal malpractice, the plaintiff has the burden of proving a "case within a case."

> In a legal malpractice case, the plaintiff must prove:
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> 1. the existence of an attorney-client relationship giving rise to a duty;
> 2. that the attorney, either my an act or a failure to act, violated or breached that duty;
> 3. that the attorney's breach of duty proximately caused injury to the client; and
> 4. that the client sustained actual injury, loss or damage.

(citations). Concerning the third element, proximate cause, Meiselman states:

[I]n attorney malpractice, the causal requirement is worded in the negative. For example, it is often said that the plaintiff can recover against the defendant-attorney only when it can be shown that the injury would not have occurred "but for" the negligence of the lawyer. Thus, the plaintiff must establish that the total or partial loss would not have occurred had it not been for some act or omission on the part of the attorney. In other words, the plaintiff must show that "but for" the negligence of the lawyer, the client's cause of action or defense against a claim in the underlying action would have been successful. Meiselman, supra at 40.

A client's burden of proving injury as a result of his attorney's negligence is especially difficult to meet when the attorney's conduct prevented the client from bringing his original cause of action or the attorney's failure to appear caused judgment to be entered against him as a defendant. In addition to proving negligence a client must show that but for his attorney's negligence he would have been successful in the original litigation. "'Accordingly, the client seeking recovery from his attorney is faced with the difficult task of proving two cases within a single proceeding.'" (citation).

The manner in which the plaintiff can establish what should have transpired in the underlying action is to recreate, i.e. litigate, an action which was never tried. This procedure of recreating the underlying action is know as

> a suit within a suit, a trial within a trial, an action within an action, a case within a case, to name but a few of the designations. (citations). The objective is to establish what the result would have been had the case been filed. (citation). This is the accepted and traditional means of resolving the issues involved in the underlying proceedings in a legal malpractice action. Id. This procedure amounts to trying tow separate and distinct lawsuits.
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> Thus, the plaintiff in a legal malpractice case has not only to prove the four elements basic to negligence cases, but may be asked to prove three additional factors: 1) that the underlying claim was valid, 2) that it would have resulted in a favorable judgment had it not been for the attorney's error, and 3) the amount of the judgment and that the judgment was collectible. (citation).

Haberer v. Rice, 511 NW2d 279, 284-285 (SD 1994). Consequently, one of the essential elements of plaintiff's claim is that he would have succeeded in his appeal. It doesn't matter how negligent defendants were, unless plaintiff would have prevailed on the appeal because he suffered no damages as a result.

II. THE TRIAL COURT MUST DECIDE WHETHER THE APPEAL WOULD HAVE BEEN SUCCESSFUL.

By this motion for summary judgment, defendants argue that plaintiff's underlying appeal (from the decision of the Department of Labor) was without merit and would not have resulted in a favorable decision even if defendants had not erred. If the issue of the success of the underlying appeal is

for the jury to determine, then there is a genuine issue of material facts and the motion for summary judgment must be denied. However, if that issue is for the Court to decide, then the matter can be reviewed by this Court and a determination made as to whether the underlying appeal would or would not have been successful.

Haberer talks about different ways in which the "case within a case" or "trial within a trial" can be submitted to a jury. However, this case is different in that the underlying case in where the error was allegedly made was an administrative appeal (see SDCL chpt. 1-26). They are not normally triable to a jury.

> An appeal shall be allowed in the circuit court to any party in a contested case from a final decision, ruling or action of an agency. SDCL § 1-26-30.2.
>
> The review shall be conducted by the court without a jury and shall be confined to the record. A trial de novo shall not be granted unless otherwise authorized by law... SDCL § 1-26-35.

Two recent cases in which issues the same as, or similar to, those in plaintiff's underlying appeal were decided by the Court (without a jury) include Beville v. University of South Dakota, 420 NW2d 9 (SD 1988) and McCauley v. South Dakota School of Mines & Technology, 488 NW2d 53 (SD 1992).

The issue of whether the case within a case (plaintiff's appeal) should be decided by the court or by a jury appears to be a matter of first impression in South Dakota. However this issue was addressed by the Supreme Court of Michigan in Charles Reinhart Co v. Winiemko, 513 NW2d 773 (Mich, 1994). In that case the Court said:

> "Since the basic premise of trying the underlying action is to prove what the result should have been, the guiding principle in

> identifying issues of law and fact is to utilize the same classification as should have been applied in the underlying case." (citation). Thus, whether an appeal lost because of an attorney's negligence would have succeeded if properly pursued is an issue for the court because the resolution of the underlying appeal originally would have rested on a decision of law. (citation). With rare exception, appeals are based on and resolved as matters of law, not fact. (citation). Thus, an appellate malpractice action presents an issue of law regarding the success of the underlying appeal within its proximate cause analysis.

At 777. The *Reinhart* Court further quoted with approval the reasoning of the Texas Supreme Court in Millhouse v. Wiesenthal, 775 SW2d 626, 628 (Tex 1989):

> ...[Plaintiff's] petition that the jury should make this determination as a question of fact would require the jury to sit as appellate judges, review the trial record and briefs and decide whether the trial court committed reversible error. A judge is clearly in a better position to make this determination.

IV. ANALYSIS OF THE CASE WITHIN A CASE

The underlying case is an appeal from a decision of the South Dakota Department of Labor. This is an administrative appeal under SDCL chpt. 1-26. Plaintiff argued in his appeal that: 1) the University failed to comply with the provisions of the COHE contract in his termination and 2) the actions of the University administration infringed on his academic freedom.

The appellant has a heavy burden in appeals such as this. Great deference is given to findings of fact by the administrative agency and decisions of the agency must be upheld unless the decision is clearly erroneous or unless the court is left with a definite and firm conviction that a mistake has been made.

> This court reviews the record of administrative agencies in the same manner as the circuit court. SDCL 1-26-37. Appeal of Hendrickson's Health Care, 462 NW2d 655 (SD 1990); Peery v. Department of Agriculture, 402 NW2d 695 (SD 1987); In Matter of Application of Northwestern Bell Tel. Co., 382 NW2d 413 (SD 1986). Since the circuit court affirmed Department's findings of fact and conclusions of law in their entirety, our review is of the agency's findings and conclusions. Matter of Midwest Motor Exp., Inc., Bismarck, 431 NW2d 160 (SD 1988).
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> Conclusions of law are given no deference on appeal and are freely reviewable. SDCL 1-26-36. Hendrickson's, 462 NW2d at 656; Karras v. State, Dept. of Revenue, 441 NW2d 678 (SD 1989); Sharp v. Sharp, 422 NW2d 443 (SD 1988)). Questions of fact, however, are given greater deference. SDCL 1-26-36. This court does not substitute its judgment for Department's on the weight of evidence pertaining to questions of fact unless Department's decision is clearly erroneous, or is arbitrary, capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion. Finch v. Northwest School Dist. No. 52-3, 417 NW2d 875 (SD 1988)); Perman v. Dept. of Labor, Unemp.

Ins. D., 411 NW2nd 113 (SD 1987)); Appeal of Templeton, 403 NW2d 398 (SD 1987)); Anderson v. Western Dakota Insurors, 393 NW2d 87 (SD 1986). We will not reverse an agency decision unless we are left with a definite and firm conviction that a mistake has been committed. Finck, 417 NW2d at 878; Matter of Midwest, 431 NW2d at 162; Dakota Harvestore v. S.D. Dept. of Revenue, 331 NW2d 828 (SD 1983); Fraser v. Water Rights Commission, Etc., 294 NW2d 784 (SD 1980). McCauley, supra at 55.

A. Violation of the COHE Contract

Plaintiff argues that, because defendants filed a brief on his behalf claiming that his appeal had merit, they can not now claim that he would have lost the appeal. In effect he claims that every lawyer is a guarantor of the positions that they take in court. If plaintiff's appeal is determined to be meritorious merely because defendants filled a brief for him, arguing that it was meritorious, then no attorney could afford to take any novel, complicated or difficult case. This would have a chilling effect on the availability of representation in new or novel cases. See Charles Reinhart Co. v. Winiemko, supra, footnote 16.

Plaintiff lost at both the Board of Regents and the Department of Labor levels. Following the Department of Labor hearing, the Administrative Law Judge (ALJ) made the following conclusion of law:

> Conclusion of Law II. The procedure followed by the University of South Dakota in connection with non-renewal of Petitioner's contract was lawful and complied in all respects with the requirements of the

negotiated labor agreement and the applicable polices of the University of South Dakota.

Construction of contracts is a question of law for the Court. Alverson v. Northwestern Nat'l Cas. Co., 1997 SD 9, ¶5, 559 NW2d 234, 235; Olson v. United States Fidelity and Guar. Co., 1996 SD 66, ¶6, 549 NW 2d 199, 200. "The primary rule in construction of contracts is that the court must, if possible, ascertain and give effect to the mutual intention of the parties." S & S Trucking v. Whitewood Motors, Inc., 346 NW2d 297 299 (SD 1994) (citing GMS, Inc. v. Deadwood Social Club, Inc., 333 NW2d 442 (SD 1983); Forester v. Weber, 298 NW2d 96 (SD 1980)). "In determining the intent of the parties, we must consider the entire contract." *Id.* (citing Chord v. Pacer Corp., 326 NW2d 224 (SD 1982).

An ambiguous contract will be construed against its drafter but the fact that the parties differ as to the contract's interpretation does not create an ambiguity. Alverson, supra at ¶8. In interpreting contracts, the Courts should use reasonable interpretations without stretching terminology. Opperman v. Heritage Mutual Ins. Co., 1997 SD 85, ¶4, 566 NW2d 487, 490 (citing State Farm Mut. Auto Ins. Co. v. Vostad, 520 NW2d 273, 275 (SD1994)).

In his hearing before the ALJ, Plaintiff argued that the University administration violated §§ 1.7 and 2.1 through 2.3 of the COHE contract. He claims that they failed to provide him with the faculty evaluation which is mandated by those sections.

It should first be noted that substantial compliance with the contract procedures is all that is necessary. It need not be perfect. The burden is on plaintiff to show that the claimed contractual violations prejudiced his substantial rights. Beville v. University of South Dakota, supra at 13-14.

The ALJ found that the procedure followed by the University in connection with non-renewal of Petitioner's contract was lawful and complied in all respects with the

requirements of the negotiated labor agreement and the applicable policies of the University of South Dakota. Plaintiff contends that the ALJ's findings would have been reversed on appeal because there were violations of § 1.7 (Nonrenewal of Tenure Tract Contracts). That section provides, in relevant part:

> Prior to the issuance of a written notice of nonrenewal, the faculty unit member's immediate supervisor will provide the opportunity for a meeting with the faculty unit member to apprise the faculty unit member of the proposed action. The faculty unit member must be given at least five (5) working days written notice of such meeting so that both the faculty unit member and the immediate supervisor may arrange to have present a witness or a representative.
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> In order to facilitate the relocation of faculty unit members who are not to be rehired, the administration agrees to provide notice of its intent not to rehire any faculty unit members serving under a tenure track contract. The notice will state the reasons for the decision and will be given in accordance with the following schedule.
>
> 1. A faculty unit member who has completed less than one (1) academic year of service under a tenure track contract shall receive written notice of nonrenewal from the institution before March 1 of the current year of appointment.

The facts of this case are undisputed. Plaintiff was a faculty unit member who had completed less than one academic year of service. He had a meeting with his supervisor in which he was advised of the proposed action

(February 27th). He received written notice of non-renewal from the institution before March 1 of the current year of appointment and the notice stated the reasons for the decision (February 29th).

Plaintiff argues that the institution's internal working papers should also have stated the reasons for the non-renewal decision. There is nothing ambiguous about this portion of the contract. The clear and plain meaning of the terms of the contract do not impose this requirement. The existence of the rights and obligations of parties to a contract are determined by the language of the contract, which must be construed according to the plain meaning of its terms. Western Cas. & Sur. Co. v. Waisanen, 653 FSupp 825, 827 (DSD 1987) (applying South Dakota law on a duty to defend issue); Alverson v. Northwestern Nat. Cas. Co., 1997 SD 9, ¶8, 559 NW2d 234, 236; Biegler v. American family Mut. Ins. Co, 2001 SD 13, ¶20, 621 NW2d 592, ____. The contract doesn't require that the internal working papers contain a statement of the reasons as long as the notice to the party being terminated contains the reasons. This Court will not impose requirements in a contract that the parties didn't include. The ALJ was correct in finding that there was no breach of this portion of the contract.

Plaintiff also claims that his supervisor had made up his mind about non-renewal prior to the meeting held on February 27th. By the terms of the COHE contract, plaintiff's supervisor was obligated to tell him at this meeting of the "proposed action." The supervisor necessarily had to have made up his mind about what he was going to do before the meeting, as he was obligated to convey that information to the plaintiff at the meeting. The ALJ was correct in finding that there was no breach of this portion of the contract.

The ALJ made a determination that the evaluation had taken place which is a factual finding to which this Court must give great deference. The court must uphold this

finding if there is any evidence to support it. The court does not substitute its judgment for Department's on the weight of evidence pertaining to questions of fact unless Department's decision is clearly erroneous, or is arbitrary, capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

In this case there was evidence of an evaluation done by plaintiff's supervisor. There was also evidence of numerous other contacts between plaintiff, his supervisor and the associate dean, in an effort to improve his teaching performance.[4] Clearly there was a substantial compliance with the evaluation portions of the COHE contract. This court will not substitute its judgment for the Department of Labor's. The Department's findings are not clearly erroneous, or arbitrary, capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

It also appears that the ALJ found that §§ 2.1 through 2.3 of the COHE contract have no application to the renewal of a contract, which would be a conclusion of law subject to a de novo review by this Court.

. § 1.7 is one portion of the COHE contract dealing with "Nonrenewal of Tenure Track Contracts." §§ 2.1 through 2.4 is a completely separate portion of the contract dealing with "Evaluations." No portion of 1.7 incorporates or refers to the Evaluation portion. No portion of 2.1 through 2.4 incorporates re refers to non-renewal of employment contracts. In fact, §2.1(5)(e) indicates that the evaluation

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[4] Plaintiff admits that an evaluation took place because he attacks the statements made in the evaluation. His supervisor indicated in the evaluation that student evaluations of plaintiff were unfavorable. Plaintiff attacks this as a violation of § 2.3(3) of Division II of the COHE contract. However, plaintiff ignores the explicit language of § 2.3 which allows the use of student opinion surveys as part of the evaluation process provided that they are corroborated.

process can be used to justify alternative disciplines but makes no mention of non-renewal decisions.

Under different facts, but in a similar context, the Supreme Court in Beville v. University of South Dakota, supra held that a portion of the COHE Contract dealing with prescriptive plans had nothing to do with portion of the COHE Contract dealing with tenure decisions.

§ 1.7 of Division II of the COHE contract dealing with "Nonrenewal of Tenure Track Contracts" appears to be a complete and comprehensive procedure for handling non-renewal decisions. No part of that complete procedure involves evaluations. § 7.1(4) of Division I indicates that one of the purposes of the evaluations is to provide information for personnel decisions such as contract renewal. Noting in this section indicates that evaluations are the sole and exclusive source of information for personnel decisions. Most importantly, nothing in this section indicates that personnel decisions can not be made in the absence of an evaluation. The caption for this section cross-references to Division II, Article II and Division III, Article II but does not cross-reference to Division II, Article I (which contains the non-renewal sections). There is no portion of the COHE contract which supports plaintiffs premise that a properly completed faculty evaluation is a prerequisite to renewal decisions. This Court concludes that ALJ was correct in finding that §§ 2.1 through 2.3 of the COHE contract have no application to the non-renewal procedure set out in § 1.7 of the contract.

Plaintiff also complains that the Student Opinion Surveys were the "controlling criterion" in the non-renewal decision. There is nothing in the record which supports this claim. As pointed out above (in footnote 4) Student Opinion Surveys may be used as part of the evaluation process. Plaintiff errs in equating the evaluation and the non-renewal

process. In addition, the meaning of the term "controlling" goes far beyond the meaning of "primary."[5]

B. Academic Freedom

The second issue raised by plaintiff is his claim that the actions of the University Administration infringed on his academic freedom. In regard to that claim the ALJ found as follows:

> Finding of Fact XI. Myers and Reinke made no attempt to foist upon Petitioner certain methods of teaching or course content.
>
> And
>
> Conclusion of Law III. Petitioner's academic freedom was not infringed in any manner.

There were both findings of fact and a conclusion of law involved in this issue. As pointed out above, conclusions of law are given no deference on appeal and are freely reviewable but, in regard to findings of fact, the court does not substitute its judgment for the ALJ's on the weight of evidence pertaining to questions of fact unless the ALJ's decision is clearly erroneous, or is arbitrary, capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

After a full review of the facts in this case, this Court can not find any evidence that either plaintiff's supervisor or the associate dean infringed on his academic freedom in any manner. Plaintiff's arguments are essentially contradictory. He argues that his supervisor didn't make enough of an effort to help him change his teaching to comply with their

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[5] Control means to exercise control over, to dominate or direct while primary means the first or highest in rank of importance. An item can be primary without being controlling.

expectations but on the other hand, he argues that the efforts which were made, infringed on his academic freedom. This Court does not find that this finding by the Department is clearly erroneous, or is arbitrary, capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion. This Court will uphold the decision of the ALJ in finding that there was no infringement on plaintiff's academic freedom.

CONCLUSION

While not in any way justifying any negligence or failure on the part of defendants which prevented plaintiff from having his appeal fully and fairly heard, this Court concludes that plaintiff would not have prevailed in his appeal. Consequently, he did not suffer any loss or detriment as a result of the alleged negligence on the part of defendants. Defendants motion for summary judgment is granted. Counsel for defendants may prepare an order in accordance with this memorandum opinion.

Cc: Yankton County Clerk of Courts (original for the file)

APPENDIX B: OPINION, APPEAL #22617, SOUTH DAKOTA SUPREME COURT, APPEAL FROM THE FIRST JUDICIAL CIRCUIT, YANKTON COUNTY, SOUTH DAKOTA, HORABLE ARTHUR L. RUSCH, JUDGE, FILED SEPTEMBER 3, 2003

Thomas J. Yarcheski
Appellant

v.

Kevin Reiner, Celia Miner, and Johnson, Heidepreim, Miner, Marlow & Janklow, LLP,
Appellees

Considered on briefs on April 24, 2003

Judges: Before: Chief Justice David Gilbertson, Justices Richard W. Sabers, John K. Konenkamp, Judith K. Meierhenry, and Retired Justice Robert A. Miller (sitting for Steven L. Zinter, disqualified); Opinion by Konenkamp

[¶1.] Following his unsuccessful challenge to the procedures by which his university tenure-track contract was not renewed, plaintiff appealed in circuit court. His appeal was dismissed, however, when his attorneys submitted an untimely brief. He then brought a legal malpractice suit against his attorneys. In granting summary judgment for the attorneys, the circuit court ruled that plaintiff would not have prevailed in his administrative appeal even if his brief had been timely filed.

I.

[¶2.] Plaintiff, Thomas J. Yarcheski, Ph.D., was a first-year tenure track faculty member employed at the University of South Dakota during the 1991-92 school year. He served as an Associate Professor, teaching Health Services Administration at the School of Business. Early in his first semester, several students came to Associate Dean Robert Reinke with complaints about Yarcheski's teaching. These ranged from criticism of his arrogance in the classroom to dissatisfaction with his disorganized teaching style. Yarcheski later acknowledged that his teaching style differed from what many students expected. In was his object to pursue greater academic standards than those sought by his colleagues on the faculty.[1] To this end, he required more student interaction, avoided lecturing directly from the text, and chose not to design his lectures simply to provide an outline of material.

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[1] His previous position was Associate Professor and Program Director at St. Joseph's College in Maine. Although Yarcheski quotes the President of St. Joseph's in rating his teaching performance as "masterful," his contract there was also not renewed because of his teaching performance. He filed a grievance claiming that the college did not follow proper procedures for nonrenewal. His grievance was unsuccessful, as was his subsequent lawsuit.

[¶3.] As a result of the complaints, Reinke and the Director of the Department of Health Services Administration, Professor Michael J. Myers, met with Yarcheski informally several times to make suggestions on how he might improve the organization and presentation of his course material. Yarcheski was not altogether responsive to these suggestions. For instance, he reacted inappropriately to the suggestion that he refer to the textbook during his lectures. He returned to his class and read the text to the students—"If you want to be involved with the text, I'll get you involved in the text."

[¶4.] Reinke and Myers also suggested to Yarcheski that they attend his classes and that a student committee be created to expedite student feedback. Yarcheski declined both suggestions. He said that their attending his classes would undermine his credibility. He told them, "I [want to] solve the problem myself." As to the student committee idea, Yarcheski thought that it would violate his academic freedom. Although they had the authority to override his requests, Myers and Reinke acquiesced. "Hang in there," Yarcheski told them, "I'll turn this around; I've been down this road before."

[¶5.] As an alternative, Yarcheski suggested that in addition to the student evaluation forms used by the university that "Harvard" evaluations forms be distributed. Harvard evaluations are open-ended invitations to students to evaluate their learning experience. After reviewing the Harvard evaluations completed at the end of the fall semester, Myers sent Yarcheski a memorandum dated January 20, 1992, outlining steps to be taken in the next nine days. The steps included attendance by Myers and Reinke in Yarcheski's classes, their review of student research papers and examinations, a self-assessment and corrective action plan to be prepared by Yarcheski, and a redistribution of the Harvard evaluation forms. Myers explained the reason for these measures:

> The issue of contract renewal, as you can appreciate, has arisen in the wake of the widespread student criticism of your teaching technique and presentation. That criticism was generally affirmed in the "Harvard" evaluations submitted by the students in your Long-Term Care and Systems courses, offset [by] a minority view that was favorable.

The memorandum explained that the university's internal deadline for recommending contract renewal was January 31. These steps, Myers wrote, "will allow us to substantiate a rationale for contract renewal, or if we are unable to obtain a more favorable assessment, provide a fair and objective basis for nonrenewal."[2]

[¶6.] Parts of this plan were never completed. Yarcheski gave Myers two grocery bags containing student work product, but Myers deemed this material irrelevant because it "would not permit a basis for meaningful comparative assessment of teaching performance." Myers had previously seen copies of student papers with Yarcheski's commentary and "markup," and on at least one prior occasion, he reviewed a draft copy of one of Yarcheski's exams. Both Reinke and Myers attended one of Yarcheski's classes. Although neither reduced their findings to writing, they informed Yarcheski directly of their observations. Myers told him on January 24 that his class presentation was "fairly rambling" and that it was not "a particularly well-taught class." Reinke also told him that the class he observed was "in general, poorly conducted." Reinke also told Myers that

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[2] In the fall semester, Reinke explained to Yarcheski that the assessment "criteria we use is thoroughly described in the faculty handbook under teaching, research, and service." The handbook categorizes performance as excellent, satisfactory, unsatisfactory, and provides descriptions. Reinke and Myers told Yarcheski that their assessment of his performance was directly related to "the competencies described in the faculty handbook in regards to teaching."

he "was not satisfied with the style and the content of the class." Myers passed this on to Yarcheski. In response, Yarcheski sent Reinke a memorandum documenting their communication on these observations.[3]

[¶7.] In a letter dated January 31, 1992, Myers recommended to the Dean and Associate Dean that Yarcheski's contract not be renewed. In turn, the Dean sent a memorandum to the Vice President of Academic Affairs:

> Consistent with the guidelines set forth in the BOR/COHE Agreement Division II, Section 1.7, I am recommending that [Dr.] Thomas Yarcheski, Health Services Administration,... be notified that [he] will not be offered a faculty contract FY 93. Dr. Yarcheski began his work with us FY 92 on a tenure track contract and has been unable to provide the Health Services program with the level of teaching performance necessary to maintain HSAD's quality reputation. After numerous meetings with related supervisors/administrators, classroom observations, and substantial student input, I am not convinced that Dr. Yarcheski is willing or perhaps able to change his teaching behavior enough to meet the standards of our program.

[¶8.] On February 20, 1992, Myers gave Yarcheski his Professional Staff Evaluation, as required by the Agreement between the South Dakota Board of Regents and the Council of Higher Education (BOR/COHE). In his evaluation

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[3] When later questioned in the grievance hearing, Reinke said that he thought Yarcheski was warm and caring with the students as individuals, but his deficiencies were in the classroom. According to Reinke, Yarcheski "would be an excellent graduate-level instructor," having a "great mind," but he was not "communicating well," was not "instructing his undergraduate students well."

instrument, Myers rated Yarcheski unsatisfactory in teaching. The accompanying comment stated, "[s]tudent evaluations indicated students did not learn relevant material. Indicated assignments were not helpful, and there was a lack of systematic presentations." Yarcheski was also rated unsatisfactory in research but excellent in service.

[¶9.] In a letter dated February 19, 1992, Yarcheski was given written notice of his opportunity to meet with Myers on February 27, 1992, before the issuance of a notice of nonrenewal. This meeting was held as scheduled. Finally, on February 29, 1992, University President Betty Turner Asher informed Yarcheski by letter that his contract would not be renewed for the 1992-93 academic year. The letter explained "[t]he reason for this action is inadequate teaching."

[¶10.] Yarcheski filed three grievances. The first was before the notice of nonrenewal, requesting abrogation of the recommendations of nonrenewal and formal participation in the process of professional evaluation. The second was on the performance evaluation. The third was in response to his notice of nonrenewal. The grist of his complaints was that his nonrenewal resulted solely from student evaluations. As he would later explain, "the evaluation of teaching performance belongs to the professoriat; we have a duty to evaluate each other; I don't believe it's the duty of students to evaluate the professoriat." The grievances were denied.

[¶11.] Yarcheski hired attorney Celia Miner of the Johnson, Heidepreim, Miner, Marlow & Janklow law firm. Kevin Reiner, an associate in the firm, assisted her. They pursued an appeal to the South Dakota Board of Regents and the Department of Labor. Both ruled against Yarcheski, concluding that proper nonrenewal procedures were followed.

[¶12.] Yarcheski then directed his attorneys to appeal the Department of Labor's decision to the circuit court.[4] A Notice of Appeal was filed on March 10, 1994. Although Reiner left the law firm in 1994, he assisted in preparing an opening brief, which was submitted on April 13, 1995. On the motion of the South Dakota Board of Regents, the circuit court dismissed the appeal because the brief had not been timely filed. Yarcheski appealed to this Court, and we summarily affirmed.

[¶13.] Yarcheski then brought this legal malpractice action against Reiner, Miner, and their law firm. Following the withdrawal of his new attorney, Yarcheski decided to represent himself. Both sides moved for summary judgment. The circuit court ruled that Yarcheski would not have prevailed on his administrative appeal, and thus his legal malpractice claim was deficient as a matter of law. The court granted summary judgment to the defendant attorneys. On appeal to this Court, Yarcheski presents the following issues: (1) "Did [the defendant attorneys] commit legal malpractice when they missed a filing deadline in the Sixth Judicial Court in 1995 resulting in the [plaintiff's] case being dismissed." (2) "Would the plaintiff have prevailed, upon appeal, in his original grievance against the University of South Dakota?"

II.

[¶14.] Evaluating academic performance is a venture beyond our expertise and our jurisdiction. In reviewing decisions concerning academic performance, our role is limited to inspecting the contract and examining the administrative proceedings to learn whether the evidence

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[4] Although Yarcheski wanted to proceed with this appeal, he had not been paying the law firm's bills. Instead, he declared bankruptcy. Nonetheless, his attorneys continued to represent him in the circuit court appeal.

supported the determination. SDCL 1-26-37. We examine a contract as a whole, giving meaning, if possible, to all its provisions. Enchanted World Doll Museum v. Buskohl, 398 NW2d 149, 151-52 (SD 1986). Fundamental to maintaining academic excellence, faculty evaluations retain a singular importance in educational institutions. Universities have a vital interest in retaining and promoting only the best faculty members. Conversely, faculty members have an equally vital interest in receiving fair evaluations. *See generally* Ford v. Nicks, 741 F2d 858, 864 (6thCir 1984); Lieberman v. Gant, 630 F2d 60, 67 (2ndCir 1980)(courts should not set as "Super-Tenure Review Committees").

[¶15.] In this case, the circuit court granted a summary judgment. Our standard for reviewing summary judgments has been recited in numerous cases and need not be repeated in detail here. *See* Kobbeman v. Oleson, 1998 SD 20, ¶4, 574 NW2d 633m 635. In accord with this standard, we view the facts in a light most favorable to Yarcheski as the opposing party. The burden remains on the defendant attorneys to prove the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. State Dep't of Revenue v. Thiewes, 448 NW2d 1, 2 (SD 1989).

III.

[¶16.] This legal malpractice action originates from the failure to timely file a brief in Yarcheski's appeal. Because the brief was filed late, the appeal was lost. However, that result, by itself, does not mean that Yarcheski wins his suit. To prevail in his legal malpractice action, Yarcheski must first prove the four basic elements of negligence: (1) an attorney-client relationship giving rise to a duty; (2) the attorneys, either by an act or a failure to act, violated or breached that duty; (3) the attorney's breach of duty proximately caused injury to the client; and (4) actual injury,

loss, or damage. Keegan v. First Bank of Sioux Falls, 519 NW2d 607, 611 (SD 1994)(citation omitted). On the element of proximate cause, Yarcheski must prove that the underlying claim was valid and would have resulted in a favorable and collectible judgment had it not been for the attorney's error.[5] Haberer v. Rice, 511 NW2d 279, 284-85 (SD 1994). Thus, Yarcheski must prove two distinct cases in a single proceeding.

[¶17.] As did the trial court, we probe one element necessary in an appellate legal malpractice claim, i.e., proof that the client would have prevailed in the appeal. That element behooves us to touch on an issue of first impression in South Dakota: is the question whether the appeal would have been successful a question for the court or the jury? *Haberer* addressed methods by which a legal malpractice claim can be submitted to a jury. *Id.* at 285. This case is different, however, because the action giving rise to the malpractice claim was an administrative appeal. *See* SDCL Ch 1-26. Administrative appeals, like all appeals, are not decided by juries. SDCL 1-26-30.2 provides that "[a]n appeal shall be allowed in the circuit court to any party in a contested case from the final decision, ruling or action of an agency." And "[t]he review shall be conducted by the court without a jury and shall be confined to the record." SDCL 1-26-35.

[¶18.] In examining this question, the Supreme Court of Michigan ruled that whether an appeal would have succeeded if it had been properly pursued is an "issue for the court because the resolution of the underlying appeal originally would have rested on a decision of law." Charles

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[5] In an action for appellate legal malpractice the plaintiff must prove two aspects of causation: whether the attorney's negligence caused the loss or unfavorable result of the appeal, and whether the loss or unfavorable result of the appeal in turn caused a loss or unfavorable result in the underlying litigation. 2RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 24.39, (3dEd 1989).

Reinhart Co. v. Winiemko, 513 NW2d 773, 777 (Mich 1994). The *Reinhart* court adopted the reasoning of the Texas Supreme Court in Millhouse v. Wiesenthal, 775 SW2d 626, 628 (Tex 1989):

> The question of whether an appeal would have been successful depends on an analysis of the law and the procedural rules. [The plaintiff"] petition that the jury should make this determination as a question of fact would require the jury to sit as appellate judges, review the trial record and briefs, and decide whether the trial court committed reversible error. A judge is clearly in a better position to make this determination. Resolving legal issues on appeal is an area exclusively within the province of judges....

We find this rationale persuasive and conclude that in an appellate malpractice action the question whether the appeal would have been successful if it had been properly pursued is a legal matter to be resolved by the court.

IV.

[¶19.] Although his attorneys filed an untimely brief, Yarcheski does not contend that its content was deficient. Indeed, he makes essentially the same arguments in this appeal that his attorneys made for him in the aborted circuit court appeal. The essence of his claim is that the evaluation and nonrenewal processes are contractually sequenced so that the decision not to renew must follow only from an adequate written evaluation in compliance with the BOR/COHE agreement.

[¶20.] Division II, 2.1 of the BOR/COHE contract, entitled "Performance Evaluation Guidelines," provides that "all faculty unit members will be evaluated annually." Yarcheski was a "faculty unit member" under Division I,

1.7. The performance evaluation must be in "written form," as required by Division II, 2.1 (2). Division II, 2.2 (3) states: "Included in the evaluation must be comments about the faculty unit member's performance in each of the areas of teaching, research and scholarship, and service." Under Division II, 2.2 (5), one of the purposes of the written evaluation is to allow the vice president or dean to review it and "make appropriate comments to the president about contract renewal...." In Division II, 2.3, the contract states that "Student opinion surveys will be used as part of the evaluation of faculty unit members, along with other procedures set forth in this article." However, per Division II, 2.3(3), "Student opinion surveys will not be used as the controlling criterion for personnel actions."

[¶21.] A written evaluation was given to Yarcheski by his immediate administrative supervisor on February 20, 1992. By the terms of Division II, 2.2, evaluations must be completed "[p]rior to the last day of February," and under Division II, 1.7, notices of nonrenewal must be given before March 1. Obviously, February 19 is "prior to the last day of February," thus it appears that the evaluation was completed in a timely manner. Although the evaluation was timely, Division II, 2.2(3) further states that "[o]bservations may include, but do not require, classroom observations, unless there is good cause to suspect serious deficiencies in performance." Yarcheski's evaluation required classroom observation because the administration had suspected "serious deficiencies in performance."

[¶22.] Yarcheski argues that his written evaluation was deficient in failing to state any criteria other than student evaluations. It simply states: "Teaching—Student evaluations indicated students did not learn relevant material, indicated assignments were not helpful, and there was a lack of systematic presentations. Rating—Unsatisfactory." While student opinion surveys may not be the determinative factor in "personnel actions," an evaluation itself is not a

personnel action. According to Division I, VII, 7.1 (4), a personnel action includes "discipline, contract renewal, salary and pay matters, tenure, and promotion."

[¶23.] Despite Yarcheski's objections to the form of his written evaluation, the record contains ample evidence that he was fully evaluated in his job performance through his many meetings with Myers and Reinke. Although the evaluation has no notations documenting classroom observation, both Myers and Reinke did in fact observe Yarcheski in class.[6] Because the academic evaluation process is partly subjective and thus less susceptible to precise judicial review, courts have held that the nonrenewal process need not be perfect: substantial compliance is all that is required. As the North Dakota Supreme Court observed in Stensrud v. Mayville State College, 368 NW2d 519 522 (ND 1985), "Generally, substantial compliance with the procedural requirements for termination is sufficient if their purpose is fulfilled." Likewise, in Piacitelli v. Southern Utah State College, 636 P2d 1063 (Utah 1981), the Utah Supreme Court concluded:

> While exact conformance with the precise terms of the termination procedures is doubtless the least controversial course, so long as the substantial interests those procedures are designed to safeguard are in fact satisfied and protected, failure to conform to every technical detail of the termination procedure is not actionable.

We apply the same standard in South Dakota. We will not override the university's judgment when contract procedures were substantially complied with and the interests of the parties were satisfied. Beville v. University of South

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[6] Myers later testified that on hindsight he "would have made it clear [in the written evaluation] that the conclusion with regard to his teaching performance was strongly influenced by, but not controlled by, student evaluation."

Dakota, 420 NW2d 9, 14 (SD 1988). Consequently, assuming for the sake of argument that the form of the evaluation was a violation of the BOR/COHE agreement, the evaluation procedures were nonetheless substantially fulfilled.

[¶24.] We come now to the heart of this case. The controlling question here is not whether the annual performance evaluation was fully completed in accord with the BOR/COHE, but whether such written evaluation was a condition precedent to nonrenewal. Our answer must come from the contract. The rights and obligations of parties to a contract are determined solely by the contract language, which must be construed according to the plain meaning of its terms. Biegler v. American Family Mut. Ins. Co., 2001 SD 13, ¶20, 621 NW2d 592, 598-99. Contract interpretation if a question of law. State Farm Mut. Auto. Ins. Co. v. Vostad, 520 NW2d 273, 275 (SD 1994).

[¶25.] In Division II, 1.7, entitled "Nonrenewal of Tenure Track Contracts," the pertinent language states:

> Prior to the issuance of a written notice of nonrenewal, the faculty unit member's immediate supervisor will provide the opportunity for a meeting with the faculty unit member to apprise the faculty unit member of the proposed action. The faculty unit member will be given at least five (5) working days written notice of such meeting so that both the faculty unit member and the immediate supervisor may arrange to have present a witness or a representative.
>
> In order to facilitate the relocation of faculty unit members who are not to be rehired, *the administration agrees to provide notice of its intent not to rehire any faculty unit members serving under a tenure track contract. The notice will state the reasons for*

the decision and will be given in accordance with the following schedule:

1. A faculty unit member who has completed less than one (1) academic year of service under a tenure track contract shall receive written notice of nonrenewal from the institution before March 1 of the current year of appointment.

* * *

(Emphasis added.) The remaining, unquoted portions of this section provide for graduated protections to tenure track faculty members as their terms of service increase beyond one year. Yarcheski was a faculty unit member who had completed less than one academic year of service. No part of Division II, 1.7 mandates an evaluation before a nonrenewal decision. Nontenured faculty members are essentially year-to-year employees. The process for nonrenewal for such employees only requires (1) an opportunity to meet, on five day's notice, with the tenure track faculty member's immediate supervisor to be appraised of the proposed action, and (2) written notice stating the reasons for nonrenewal.

[¶26.] On February 19, 1992, before the issuance of a notice of nonrenewal, Yarcheski's supervisor, Myers, advised him of the proposed action and provided a meeting date of February 27, 1992. In accord with the requirement of Division II, 1.7(1) that notice be given before March 1 of the current year of appointment, Yarcheski had written notice of nonrenewal from the university on February 29, 1992. As required by the contract, the written notice further declared the reason for nonrenewal as "inadequate teaching." Thus, the university complied with Division II, 1.7.

[¶27.] Division I, 7.1(4), entitled "Evaluation—General Provisions," states that "[t]he purpose of the evaluation will be to:..[p]rovide basic information for personnel decisions such as discipline, *contract renewal*, salary and pay matters,

tenure, and promotion." (Emphasis added.) Further, Division II, 2.2 (5) states: "The vice president/dean will review the completed evaluation and make appropriate comments to the president about contract renewal,..." Yarcheski contends that because one purpose of the evaluation is to provide information on contract renewal decisions, a properly completed faculty evaluation is a condition precedent to a valid nonrenewal decision.

[¶28.] Certainly, these provisions contemplate that the information in the evaluation will be used to make contract renewal decisions. But nothing in the evaluation and nonrenewal provisions indicates that the evaluation is the exclusive source of information for personnel decisions. Nor does any provision suggest that a written evaluation form in full compliance with the BOR/COHE contract is a prerequisite to a decision to nonrenew. In fact, the caption for Division I, 7.1 cross-references Division II, Article II and Division III, Article II, but does not cross-reference Division II, Article I containing the nonrenewal sections. We find no provision of the BOR/COHE contract that supports Yarcheski's premise that the criteria used in the decision not to renew must be set out in the performance evaluation as a prerequisite to a valid nonrenewal decision. Courts will not impose requirements in a contract that the parties themselves failed to include. Raben v. Schlottman, 77 SD 184, 190, 88 NW2d 205, 208 (1958). The ALJ and the circuit court were correct in finding that compliance with Division II, 2.1 through 2.3 is not a prerequisite to the nonrenewal procedure set forth in Division II, 1.7 of the BOR/COHE contract.

VI.

[¶29.] Yarcheski's final assertion is that the university violated his academic freedom. As stated in Division I, 10.1 of the BOR/COHE contract, "subject to accepted standards of professional responsibility," academic freedom "is

intended to guarantee those rights which are recognized as flowing from the First Amendment to the United States Constitution." The contract defines academic freedom to include "the right to study, discuss, investigate, teach and publish." More particularly, this section explains: "Faculty unit members are entitled to freedom in the discussion and presentation of their subject and are privileged to introduce various scholarly views."

[¶30.] Yarcheski believes that overreliance on student surveys infringed on his academic freedom. In his words,

> The issue of academic freedom in this case involves students judging members of the academy. It involves students controlling the destiny of faculty through their opinions and opinion surveys.... The administrators at the University of South Dakota, particularly at the School of Business, exercised no significant judgment with respect to the opinions of students concerning the teaching of faculty.

It is true that his written evaluation mentioned only student surveys. Nonetheless, after their personal observations of his classes, both Reinke and Myers concluded that his performance was unsatisfactory. Moreover, the action plan and the many conferences that they had with Yarcheski to improve his teaching cannot be understood as anything less than an expression by his supervisors of serious concern with his teaching abilities.

[¶31.] In concluding that Yarcheski's "academic freedom was not infringed," the ALJ found that Myers and Reinke made no attempt to "foist upon Yarcheski certain methods of teaching or course content." Aside from whether this finding correctly frames the scope and measure of academic freedom as between professors and administrators, we can only note that Yarcheski cites no case authority to support his argument. We readily acknowledge, nonetheless, that academic freedom generally assures to educators freedom in

their First Amendment pursuits from interference not only by administrators and other faculty, but by students as well. In any event, the circuit court ruled that "[a]fter a full review of the facts in this case, this court cannot find any evidence that either Yarcheski's supervisor or the associate dean infringed on his academic freedom in any manner."

[¶32.] University faculty members may establish an infringement of academic freedom if the decision not to rehire them was made because of their exercise of constitutionally protected First Amendment freedoms. Mt. Healthy City School Dist. Bd. Of Educ. V. Doyle, 429 US 274, 283-84, 97 SCt 568, 50 Led2d 471 (1977); Pickering v. Bd. Of Educ., 391 US 563, 574, 88 SCt 1731, 20 Led2d 811 (1968). Untenured employees enjoy the same freedoms. *See* Perry v. Sinderman, 408 US 593, 597-98, 92 SCt 2694, 33 Led2d 570 (1972). On the other hand, universities have an interest as employers "in promoting the efficiency of the public services" they perform through their faculty members. *Pickering*, 391 US at 568, 88 SCt at 1734-35, 20 Led2d at 817. Under the aegis of academic freedom, a university may "determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." Sweezy v. New Hampshire, 354 US 234, 263, 77 SCt 1203, 1218, 1 Led2d 1311 (1957) (Frankfurter, J., concurring in result).

[¶33.] Education officials may decline to renew a contract for academic reasons unrelated to academic freedom, such as inadequacy in teaching or failure to obey legitimate administrative directives. *See* Adams v. Campbell County School Dist., 511 F2d 1242 (10th Cir 1975); Ahern v. Bd. Of Educ. Of School Dist. Of Grand Island, 456 F2d 399 (8thCir 1972); Chung v. Park, 514 F2d 382 (3dCir), cert. Denied, 423 USW 948, 96 SCt 364, 46 Led2d 282 (1975). In fact, a university may lawfully choose not to renew the contract of a nontenured professor whose pedagogical attitude and teaching methods fail to conform to institutional standards.

Hetrick v. Martin, 480 F2d 705, 708 (6thCir), cert. Denied, 414 US 1075, 94 SCt 592, 38 Led2d 482 (1973). *Hetrick* dealt with the administration's dissatisfaction over a nontenured professor's teaching methods and ability. There, the Sixth Circuit Court of Appeals found that no First Amendment interests were implicated when a university decided not to renew the contract of a nontenured professor because of her teaching style and methods. *Id.* Numerous students had complained about "their ability to comprehend what she was attempting to teach them or what was expected of them." *Id.* at 706. The First Amendment guarantee of academic freedom does not require a university to tolerate any manner of teaching method a professor may choose to employ. *Id.* at 707.

[¶34.] Yarcheski never explains how his inadequate teaching style, as evaluated by the university as well as many of his students, fits under the protection of academic freedom. Nor does he submit any legal justification to prohibit student input on faculty performance. To maintain academic excellence, institutions of higher learning must ensure that their students have the benefit of the best education. The university's choice in using student surveys as part of its effort to fulfill that goal is not an infringement of academic freedom. Surely, educational institutions have the right to expect that their teachers will be able to teach.

[¶35.] For the foregoing reasons, we conclude that Yarcheski would not have prevailed in the appeal from his grievance against the University of South Dakota; therefore, his claim for legal malpractice fails for lack of proof of an essential element.

[¶36.] Affirmed.

[¶37.] GILBERTSON, Chief Justice, and SABERS and MEIERHENRY, Justices, and MILLER, Retired Justice, sitting by Order of the Court, concur.

[¶38.] MILLER, Retired Justice, sitting for ZINTER, disqualified.

APPENDIX C—IN THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA, ORDER DENYING REHEARING (#22617), DAVID GILBERTSON, CHIEF JUSTICE, FILED OCTOBER 21, 2003

Thomas J. Yarcheski,
Plaintiff and Appellant

Vs.

Kevin L. Reiner, Celia Miner and Johnson, Heidepreim, Miner, Marlow & Janklow, LLP,
Defendants and Appellees

A petition for rehearing in the above cause having been filed September 19, 2003, and no issue or question of law or fact appearing to have been overlooked or misapprehended, and more than fifteen days having elapsed therefrom and no written statement having been filed with the Clerk of this Court by a majority of the justices requesting a rehearing, now, therefore, in accordance with the Rehearing Procedure Rule of this Court, the petition for rehearing is denied.

DATED at Pierre, South Dakota, the 21st day of October, 2003.

ATTEST: Shirley Jameson-Fergel, Clerk of the Supreme Court, by Cindy Leichtnam, Chief Deputy Clerk (with seal)